

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: September 22, 2003

TO : Rodney Johnson, Acting Regional Director
Region 15

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: W.G. Yates and Sons Construction Co.
Case 15-CA-17038

This case was submitted for advice on whether the Employer unlawfully caused the trespass arrest of a Union organizer under the Supreme Court's decision in BE & K.¹

We conclude that the Employer's criminal complaint was not unlawful even though it was summarily dismissed. The complaint was not legally and factually baseless because the Employer reasonably believed the Union organizer was unlawfully trespassing. There is insufficient evidence that the Employer filed the complaint solely to impose the costs and hardship of an arrest because the Employer reasonably could have been concerned with protecting its property against another trespassory incursion.

FACTS

The Employer is a general contractor engaged in the renovation of a hotel on a jobsite owned by a department of the State of Alabama. On February 19, 2003, the Employer discriminatorily denied jobsite access to five Union organizers, who then filed a charge in Case 15-CA-16993. The Region conditionally dismissed that charge because the Employer's conduct was isolated, the Union otherwise had access to jobsite employees, and the incident apparently arose from a misunderstanding by the guard employed by a contractor to protect the Employer's site. [FOIA Exemption 5

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Union agent Boykin was one of the five agents discriminatorily denied access in the above case. On February 21, two days after the Employer had denied Boykin and the other Union organizers access, Boykin was

¹ BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

handbilling at the jobsite entrance when he observed fuel leaking from the Employer's site. Looking through an open gate, Boykin saw that the Employer's track hoe had ruptured an underground fuel container. Boykin also saw the Employer attempting to confine the fuel leak with sandbags.

Boykin called the fire department; Fire Department and HazMat teams soon arrived. Boykin told one of the fireman that the leaking fuel was coming from the Employer's site. When the fireman asked Boykin to show him the fuel leak, Boykin noted that the Employer's site was posted against trespassing. The fireman replied that, as a city official, he was giving Boykin permission to go onto the property to show him the fuel leak. Boykin and the fireman entered the jobsite and walked to the fuel leak. When Employer Superintendent Jones saw Boykin and the fireman, Jones loudly protested that they were trespassing and were not supposed to be in that area. Boykin and the fireman immediately left. The fireman did not advise the Employer that he had authorized Boykin to accompany him onto the jobsite.

Boykin left the entrance to the site but returned an hour later. When the Superintendent Jones saw Boykin, he told him "You finally found what you were looking for" and stated he was going to have Boykin arrested. Jones flagged down a police cruiser and had the police arrest Boykin. The Employer's criminal complaint against Boykin alleges second degree trespass which lies where an individual "knowingly enters or remains unlawfully in a building or upon real property which is fenced or enclosed in a manner designed to exclude intruders."² The Employer's criminal complaint was dismissed at a scheduled hearing in May when the Employer failed to appear.

The Employer does not own the jobsite premises. However, the Employer's agreement with the State provide the Employer with possession of the job site and also with sole responsibility for job site safety. The Employer's jobsite is enclosed and posted with a "no trespassing" sign. A guard posted at the entrance requires all visitors to sign in and wear a hard hat. When Boykin entered the jobsite with the fireman, he had not previously signed in and he was not wearing a hard hat.

ACTION

The Employer's criminal complaint against Boykin was not baseless because the Employer reasonably believed he was

² Alabama Code 13A-7-3.

trespassing, and was not sought with a retaliatory motive solely to impose the costs of an arrest because the Employer reasonably could have been concerned with protecting its property against another trespass.

The lawfulness of the Employer's criminal complaint raises First Amendment considerations under Bill Johnson's.³ In Johnson & Hardin Co.,⁴ the Board stated that filing a criminal complaint with governmental officials is, like filing a civil lawsuit, "an aspect of the right to petition the Government for redress of grievances."⁵ Johnson & Hardin is thus consistent with BE & K, 122 S.Ct. at 2396, where the Court observed that "the right to petition extends to all departments of the Government."⁶

The Supreme Court in BE & K rejected the Board's application of Bill Johnson's for adjudicating unsuccessful but reasonably based lawsuits.⁷ The Court found that the Board's reading of Bill Johnson's was over broad because the class of lawsuits that the Board wished to proscribe included a substantial portion that involved genuine "petitioning" protected by the Constitution.⁸ The Court thus indicated that the Board could no longer rely on the fact that a lawsuit was ultimately meritless, but must determine whether it was reasonably based regardless of its outcome.⁹

The BE & K Court also criticized the Board's standard for finding retaliatory motive in cases in which "the employer could show the suit was not objectively

³ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

⁴ 305 NLRB 690, 691 (1991), *enfd.* in relevant part 49 F.3d 237 (6th Cir. 1995) (Bill Johnson's analysis, used to evaluate lawfulness of alleged retaliatory civil suits, applied to criminal trespass complaints).

⁵ 305 NLRB at 691.

⁶ See also Mr. Z's Food Mart, 325 NLRB 871, 871 n. 2, 894 (1998), *enf. denied* in part, 265 F.3d 239 (4th Cir. 2001); Control Services, 315 NLRB 431, 455-56 (1994).

⁷ 122 S.Ct. at 2397, 2400, 2402.

⁸ *Id.* at 2399 ("...even unsuccessful but reasonably based suits advance some First Amendment interests").

⁹ *Id.* at 2399-2402.

baseless."¹⁰ In *dictum*, the Court suggested that an unsuccessful but reasonably based lawsuit could be considered an unfair labor practice if it would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."¹¹

Because the Supreme Court in BE & K did not enunciate the standard for determining whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits remains authoritative. In Bill Johnson's, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.¹² Thus, while "genuine disputes about material historical facts should be left for the state court, plainly unsupported inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."¹³ Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."¹⁴ Thus, a lawsuit can be deemed baseless only if it presents unsupported facts or unsupported inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

In the instant case, the Employer's criminal complaint against Boykin is akin to a completed, unsuccessful lawsuit because the county court dismissed the complaint. We conclude, however, that the Employer's criminal complaint was neither legally nor factually baseless. First, it seems clear that the Employer had a sufficient property interest to exclude Boykin from the jobsite. The Employer's jobsite agreement not only gives the Employer possession of the job site, it charges the Employer with sole responsibility for job site safety which would have been of heightened concern to the Employer as it coped with a hazardous fuel leak. Second, the Employer could reasonably have believed that Boykin was trespassing on its jobsite. The property was

¹⁰ Id. at 2400-2401.

¹¹ 122 S.Ct. at 2402.

¹² 461 U.S. at 744-746.

¹³ Id. at 746, n. 11.

¹⁴ Id. at 746.

clearly posted and enclosed, the fireman did not advise the Employer that he had authorized Boykin's presence, and Boykin was not wearing a hard hat as he would have been required to do had he lawfully signed in and entered through the guarded entrance. The Employer's belief that Boykin was trespassing was confirmed when both the fireman and Boykin immediately left after the Employer told them they were trespassing.

We also conclude that there is insufficient evidence that Boykin's criminal complaint would not have been brought "but for a motive to impose the costs of the litigation process, regardless of the outcome." We recognize that the Employer caused Boykin's arrest after Boykin had immediately left when ordered to do so, and that Superintendent Jones stated that Boykin had "finally found" what he had been looking for. The timing of the arrest and this statement suggest that the Employer was not concerned with Boykin's trespass but rather was retaliating against Boykin for having uncovered and reported the hazardous fuel leak. On the other hand, the Employer saw Boykin at its entrance shortly after the Employer had ejected him as a trespasser during a hazardous fuel spill. The Employer could have reasonably believed that it needed to file a criminal trespass complaint to be assured that Boykin would not again enter the jobsite to look for additional, hazardous conditions.

In sum, the Employer's criminal complaint was neither legally nor factually baseless, and there is insufficient evidence showing that the Employer filed the complaint solely to impose the costs and hardship of an arrest.

B.J.K.